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No. 184

In the Supreme Court of the United States

October Term, 1958

Jersey Shore Corporation, Petitioner

v.

Marine Bancorp., Inc.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, PETITIONER

v.

MANDEL BROTHERS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A short response is necessary to two arguments which respondent makes in its opposition brief on the issue of whether the invoicing provisions of the Fur Products Labeling Act are applicable to retail sales. We believe that respondent's other arguments on this issue, as well as its contentions with respect to the second question presented, have been fully met in our petition.

1. Respondent contends that the label on a fur product adequately protects consumers from deception (Br. Opp. 5–6), and that a retail invoice "would add no benefit for" them (*id.*, 10).

This contention, however, overlooks the temporary character of the "label" which is used to furnish the

information required by the Act. It is not a "label" in the ordinary understanding of the word—that is, a piece of cloth permanently affixed to the garment by sewing. On the contrary, the record indicates (Comm. Ex. 1, App. 57; Resp. Ex. 1, App. 117) that the "label" is no more than a tag which is temporarily attached to the garment, apparently by tying. Such a tag obviously is removed from the garment before it is worn, and it is likely to be discarded by the consumer. The invoice, on the other hand, constitutes the consumer's permanent record, and, in all probability, would commonly be retained long after the "label" had been destroyed.

2. Respondent also contends (Br. Opp. 6–10) that the legislative history of the Fur Products Labeling Act indicates that the "major emphasis" of the legislation was "on the invoicing of furs (not yet manufactured into garments) and on the labeling of fur products," and that this distinction supports the holding below that the Act's invoicing requirements are not applicable to fur products sold at the retail level.

This argument ignores the fact that most of the statutory provisions dealing with invoicing apply to fur products as well as furs. For example, Sections 3 (a) and 3 (b) prohibit the sale "of any fur product which is * * * deceptively advertised or invoiced," and Section 5 (b) sets forth the circumstances when "a fur product or fur shall be considered to be falsely or deceptively invoiced * * *." Furthermore, Section 2 (f) of the Act defines "invoice" as "a written account, memorandum * * * which is issued in con-

nection with any commercial dealing in *fur products or furs,* and describes the particulars of any *fur products or furs,* transported or delivered to a purchaser, consignee, * * * or any other person who is engaged in dealing commercially in *fur products or furs*" (emphasis added). Thus, while the main thrust of the Act may have been against mislabeling of fur products, Congress also outlawed false and deceptive invoicing of such products, and not just furs.

Indeed, petitioner's argument proves too much. If the invoicing provisions are applicable only to transactions involving furs, a retailer such as petitioner itself would not be entitled to receive invoices covering its purchases of fur products from manufacturers and wholesalers. Yet obviously such transactions are issued in connection with a "commercial dealing in fur products," and petitioner, as consignee, is a "person who is engaged in dealing commercially in fur products."

Petitioner relies upon testimony given before a House Committee hearing on a predecessor bill by a Commission official, Henry Miller (Br. Opp. 7–8). In that testimony, Miller stated that, although "having a good invoice is a help * * * it by no means can reach a situation as simply and as effectively as a tag"; and that he "fear[ed]" that it would be "rather irksome and cumbersome * * * if the retail store were required to execute an invoice at every sale at the time of sale." This testimony merely shows that, in Miller's opinion, "a good label * * * is a more effective remedy" than "a good invoice" (*id.*, p. 8). As pointed out in the petition (p. 10, n. 4), there was

also substantial testimony at that same hearing with respect to the need for requiring adequate retail invoicing. Congress adopted this latter view and, instead of treating retail labeling and retail invoicing as mutually exclusive remedies, gave "consumers" "protect[ion] * * * against deception * * * resulting from" either "misbranding * * * or false invoicing of fur products and furs * * *" (S. Rep. No. 78, 82d Cong., 1st sess., p. 1). In short, Congress did not restrict protection against false invoicing to purchasers of furs, but extended it also to "consumers * * * of fur products."

The holding of the Court of Appeals that the Act's prohibitions against false invoicing are not applicable to retail transactions would deny consumers a substantial part of the protection which Congress sought to give them.

The petition for certiorari should be granted.

Respectfully submitted.

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